In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-340

WILLIAM E. MALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the Court of Claims, requesting damages for his allegedly improper discharge from the Army. The court held that petitioner's claim was barred by the court's six-year statute of limitations, 28 U.S.C. 2501. Petitioner's principal contention here is that a prior district court proceeding that he had instituted on April 6, 1973 tolled the running of the statute of limitations.

Petitioner was discharged from the Army on August 18, 1967. On April 6, 1973, he brought suit in the United States District Court for the Western District of Oklahoma, claiming that his discharge was illegal and requesting monetary relief. The government moved to dismiss for lack of jurisdiction. Petitioner then moved for a voluntary dismissal, which the court granted.

In November 1973, more than six years after his claim accrued, petitioner attempted to commence suit in the Court of Claims. His petition was initially rejected

for failure to comply with Court of Claims Rules 42 and 213,[1] and was subsequently filed on December 26, 1973. On May 17, 1974, the suit was dismissed.

The dismissal was correct. The Court of Claims may exercise jurisdiction over claims only if they are filed within six years after the claim first accrues. 28 U.S.C. 2501. A claim for illegal discharge accrues immediately upon removal from military service. *Mathis* v. *United States*, 391 F. 2d 938 (Ct. Cl.), affirmed after remand, 421 F. 2d 703 (Ct. Cl.). The statute of limitations for actions brought in the Court of Claims is not tolled by the failure of other supposed remedies, such as suit in a federal district court. *Ylagen* v. *United States*, 101 Ct. Cl. 294, certiorari denied, 322 U.S. 763.[2]

Petitioner also maintains that his action in the Court of Claims should be deemed to have commenced in November 1973, with the tender of his non-conforming petition. But since petitioner was discharged on August 18, 1967[3] and tendered even that non-comforming petition to the Court of Claims more than six years later, even if that tender is treated as a filing, the petition in the Court of Claims was out of time. In any event, a federal court may refuse pleadings that disregard the court's

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[1]Rule 42 requires that the original of every pleading or paper of a party represented by an attorney be signed by an "attorney of record" admitted to practice before the Court of Claims. Rule 213 sets forth the form and size requirements with which all papers filed with the Clerk of the Court of Claims must conform.

[2]Unlike *Johnson* v. *Railway Express Agency, Inc.*, No. 73-1543, petition for a writ of certiorari granted June 3, 1974, this case does not involve a statutory scheme from which a congressional intention to permit tolling of the limitation period may be inferred.

[3]Petitioner asserts that the government's pleadings in the Court of Claims were "not in harmony" on the issue of the actual date of his Army discharge (Pet. 22). The government stated in its motion to dismiss in the Court of Claims that petitioner's discharge

rules. See, *e.g.*, *Snider* v. *All State Administrators*, 414 U.S. 685; *Zap* v. *United States*, 326 U.S. 777; *Algonac Manufacturing Company* v. *United States*, 428 F. 2d 1241 (Ct. Cl.).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfullly submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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occurred "on or before November of 1967." This was the latest date of separation which one could infer from the allegations in petitioner's complaint. Exhibits thereafter filed with petitioner's motion for rehearing revealed that the actual date of discharge was August 18, 1967. Accordingly, the August 18, 1967 date was used in the government's opposition.